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CITATIONS

667021—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 327

GEORGE SCHWARTZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 112–115) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered July 17, 1945 (R. 116). The petition for a writ of certiorari was filed August 16, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the property stolen was part of a foreign shipment of freight at the time of the theft.

2. Whether the trial judge erred in commenting upon the credibility of a codefendant who had pleaded guilty and testified on behalf of the Government and was awaiting sentence, and in calling the jury's attention to factors which they might consider in weighing the witness' credibility.

STATUTES INVOLVED

Section 1 of the Act of February 13, 1913, c. 50 (37 Stat. 670), as amended by the Act of January 28, 1925, c. 102 (43 Stat. 793), and the Act of January 21, 1933, c. 16 (47 Stat. 773), 18 U. S. C. 409, provides in part:

> Whoever * * * shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, wagon, automobile, truck, or other vehicles, or from any steamboat, vessel, or wharf, with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express, * * * shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both, * * *. The words "station house," "platform," "depot," "wagon," "automobile," "truck," or

> "other vehicle," as used in this section, shall include any station house, platform, depot, wagon, automobile, truck, or other vehicle of any person, firm, association, or corporation having in his or its custody therein or thereon any freight, express, goods, chattels, shipments, or baggage moving as or which are a part of or which constitute an interstate or foreign shipment.

Section 37 of the Criminal Code, 18 U. S. C. 88, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York (R. 94) on a two-count indictment (R. 3–7). Count one charged that beginning on or about July 1, 1942, and continuously thereafter up to and including September 30, 1942, petitioner, Anthony Colonna, James Stegman, Florindo Isabella, and Jack Kaps, stole from a truck 495 cases of Scotch whiskey, "moving as a part of a foreign shipment of freight consigned by James Martin & Company, Ltd., Leith, Scotland, to McKesson &

Robbins, Inc., at No. 111 Eighth Avenue, New York, N. Y.," in violation of 18 U. S. C. 409 (R. 3). Count two charged that the defendants conspired to violate 18 U. S. C. 409 by arranging to board a Hoboken–West Twenty-third Street ferry, steal with and from a truck the whiskey described in the first count, remove the drivers of the truck, and conceal the whiskey in a certain garage owned by defendant Kaps (R. 4–5). The case was severed as to Colonna on motion of the Government (R. 10); Stegman, Isabella, and Kaps pleaded guilty (R. 8–9), and petitioner was tried alone (R. 10). Petitioner was sentenced to ten years' imprisonment on the first count and two years on the second, to run consecutively (R. 101, 104). On appeal to the Circuit Court of Appeals for the Second Circuit, the conviction was affirmed (R. 116).

The pertinent evidence adduced at the trial may be summarized as follows:

McKesson & Robbins, Inc., of New York, was the importer of 1,000 cases of whiskey from Scotland under a bill of lading naming the Manufacturers Trust Company as consignee and bearing the notation "Notify McKesson & Robbins, Inc., 111 Eighth Avenue, New York, N. Y." (R. 12–14, 16, 113). The invoice was addressed to McKesson & Robbins at 111 Eighth Avenue, New York (R. 14). While the whiskey was in marine transit, McKesson & Robbins paid the invoice and freight charges, and received from the Manufacturers

Trust Company an assignment of the bill of lading (R. 16, 17). The carrier docked and unloaded the shipment on a pier at Hoboken, New Jersey (R. 20). Thereafter, McKesson & Robbins sent two of its employees to Hoboken with a leased, bonded truck to pick up 495 cases of the whiskey, on which the customs duty and taxes remained unpaid (R. 15), and haul them to the firm's bonded warehouse in New York (R. 16, 20, 25). Five cases had been kept out to go into the public stores for inspection by the customs appraisers (R. 19, 20). The employees put the cases on the truck and headed for New York via the Twenty-third Street Ferry (R. 20, 21, 26). In the meantime, according to the testimony of the defendant James Stegman and his brother William, another accomplice (see R. 42–48, 57–59), both of whom were called as witnesses on behalf of the Government (R. 41, 53), petitioner had made plans with James Stegman, Colonna, and Isabella to "hijack" the truck (R. 55–58). Petitioner, James Stegman, and Isabella followed the truck aboard the ferry in a car (R. 42–45, 59). When the ferry reached its slip in New York, petitioner left the car, mounted the running board of the truck, and at gun point compelled the employees to drive the truck a short distance beyond the slip (R. 60–61; see also R. 22–23, 26–27). He then made the employees stop, covered their eyes with taped glasses, and forced them to enter the

car, in which Stegman and Isabella had followed. Petitioner directed Stegman to drive the truck to a "drop" in Brooklyn (R. 58, 61–62), while he and Isabella took the employees in the car to a different neighborhood, where they detained them on the roof of a building for a few hours and then released them. (R. 23–24, 27–28, 61.) After the whiskey had been unloaded at the drop, James Stegman drove the truck to New York and abandoned it (R. 61–63).

Petitioner did not take the stand or offer any evidence in his behalf, except a stipulation that if the defendant Kaps had been called, he would not have been "able to identify" petitioner (R. 83.)

ARGUMENT

1. Petitioner contends (Pet. 9–17) that the trial court committed reversible error in denying his motion for a directed verdict made at the end of the Government's case on the ground that, as a matter of law, at the time of the larceny the whiskey was no longer moving as a part of a foreign shipment, as alleged in the indictment (R. 80–81). He argues that when McKesson & Robbins paid the invoice and received by assignment the bill of lading while the shipment was in marine transit, it thereby acquired the right to change the contract of shipment in any way agreeable to itself and the carrier; that in consequence of the practice and course of conduct between McKesson

& Robbins and the carrier on this and prior shipments, an agreement had resulted whereby, after payment of the price and freight charges, the whiskey was to be unloaded and delivered to McKesson & Robbins at a pier in Hoboken, there to be entered in customs pending payment of the duties, and then removed by truck to McKesson & Robbins' bonded warehouse in New York;[1] that under these circumstances, irrespective of any original intention as to the ultimate destination of the whiskey, the legal effect of the contract of shipment, as modified by this practice and course of conduct, was to complete at the Hoboken pier the whiskey's movement as part of a foreign shipment; and that, therefore, the theft of the whiskey while en route from Hoboken to New York via truck was not a larceny of a foreign shipment of freight. We submit that petitioner's contention and argument are without merit.

The intention of the shipper and McKesson & Robbins, as evidenced by the address on the in-

[1] There is no evidence of any "practice and course of conduct" on the part of McKesson & Robbins, except as indicated by the testimony of the firm's traffic manager, who testified: "The accepted practice of McKesson in the purchase of Scotch whiskey was that it was agreed that it was to be cleared through the Manufacturers Trust Company, and the bill of lading was assigned by them and endorsed by them after McKesson had paid for the merchandise" (R. 16–17). It is to be noted that the arrangement referred to was one between the importer, the shipper, and the bank, and not between the importer and the carrier.

voice and the indorsement on the bill of lading to notify McKesson & Robbins at its address in New York, was that the whiskey was to be delivered to its bonded warehouse in New York. We submit that there is no proof of any "agreement," as asserted by petitioner (Pet. 11–12), between the carrier and McKesson & Robbins calling for a change in the destination of the shipment. An erroneous impression is conveyed in petitioner's argument that the ad interim entry of the whiskey in customs in Hoboken was inconsistent with the expressed intention of McKesson & Robbins to enter it in customs in the bonded warehouse in New York. The evidence and the realities of the situation lend no support to that contention. The entry in customs in Hoboken was unavoidable, being a legal detail required by the revenue laws, and having no significance as a determinant nullifying the importer's intention that the whiskey resume its journey for final entry into customs at New York. A mere change in the method of transportation does not, of course, affect the continuity of the transit where such interruption is only temporary and in execution of the original purpose. The nature of a shipment does not depend upon the question when or to whom the title passes, but is determined by the essential character of the commerce and the intention of the parties as to the ultimate destination of the goods. *United States* v. *Erie R. Co.*, 280 U. S. 98, 101–

102;[2] *Levi* v. *United States,* 71 F. 2d 353, 354 (C. C. A. 5); *Friedman* v. *United States,* 233 Fed. 429 (C. C. A. 1), certiorari denied *sub nom. Freedman* v. *United States,* 244 U. S. 657, writ of error dismissed, 244 U. S. 643; cf. *Minnesota* v. *Blasius,* 290 U. S. 1, 9–10; *Hughes Bros. Co.* v. *Minnesota,* 272 U. S. 469, 474. Applying these principles to the facts of the instant case, we think it is clear that the whiskey was still moving as part of a foreign shipment at the time of the theft. See *Marifian* v. *United States,* 82 F. 2d 628, 630 (C. C. A. 8), certiorari denied, 298 U. S. 686, where it was held that the protection of the statute here involved extended to goods, the carriage of which by rail had been completed at East St. Louis, Illinois, and which were at the time of the theft being transported in a truck leased by the consignee to its place of business in St. Louis, Missouri.

The circuit court of appeals found it unnecessary to decide whether the whiskey was moving as part of a foreign shipment at the time it was stolen, because in its view the whiskey was clearly moving in interstate commerce from New Jersey to New York, and the court held that proof showing that it was moving as an interstate shipment

[2] In that case a shipment of wood pulp was imported from abroad through the port of Hoboken, New Jersey, and taken from there to Garfield, New Jersey, by rail, and it was held that the rail transportation was in fact a part of foreign commerce.

did not constitute a fatal variance. Petitioner argues here (Pet. 17–22) that his conviction cannot be sustained on that ground. In view of the considerations advanced above, we deem it unnecessary to support with extensive argument the judgment below on the basis chosen by the court. However, we agree that on such basis there is no fatal variance between the indictment and the proof, since, as the court pointed out (R. 114), the indictment fully apprised the defendants of the facts which made up the charges against them (see pp. 3–4, *supra*) and they could not, therefore, have been misled or surprised.

2. In the course of his instructions, after pointing out that "certain" government witnesses were accomplices and advising the jury to scrutinize their testimony "with care and caution," the trial judge stated (R. 90–91):

> One of the witnesses here, James Aloysius Stegman, has pleaded guilty and is awaiting sentence, when he testified as a witness. Of course every witness expects that by testifying he is going to get a consideration. He would be entitled to consideration if he were telling the truth. In a case like this in all probability he is going to be sentenced by this Court, by myself. Is he more likely to tell the truth or an untruth when he is testifying before the Judge who is going to sentence him? Those are matters for you to consider. What is he to gain by telling the truth? What is he to gain by committing perjury

> **in this case? Do you think it is going to help him if he commits perjury and he is going to be sentenced by this Court? Just use your common sense and reason. These are matters for your consideration.**

Although petitioner took no exception to the instructions (see R. 91–92), he now contends (Pet. 22–25) that these remarks were tantamount to a statement that the judge believed Stegman's testimony because Stegman was not likely to lie before the same judge who was to sentence him. It is settled, however, that the trial judge may comment on the evidence and even express his opinion so long as he does not by command or other coercion infringe upon the jury's province to determine the facts. See *United States* v. *Murdock,* 290 U. S. 389, 394; *Quercia* v. *United States,* 289 U. S 466, 469; *Horning* v. *District of Columbia,* 254 U. S. 135, 138, 139. Here the judge merely called to the jury's attention certain obvious factors, of which the jury had already been apprised in the course of the trial (see R. 54, 68–69), which they might consider in weighing Stegman's credibility. The judge explicitly told the jury that the determination of the facts and the guilt or innocence of petitioner were within their sole and exclusive province (R. 87, 91), and he was careful to admonish them that even if he were to "express an opinion on any phase of the testimony, it would be in no wise binding upon" them (R. 87; see also R. 91); that his

references to the testimony were not for the purpose of emphasis, but merely to aid the jury in arriving at a verdict (R. 89). When read in its entirety, the charge is not open to criticism that the judge by the comments in question prejudiced petitioner. *Allis* v. *United States,* 155 U. S. 117, 123; *Simmons* v. *United States,* 142 U. S. 148, 155; *United States* v. *Marzano,* 149 F. 2d 923, 926 (C. C. A. 2); *United States* v. *Goldstein,* 120 F. 2d 485, 491 (C. C. A. 2), affirmed, 316 U. S. 114; *Marino* v. *United States,* 91 F. 2d 691, 699 (C. C. A. 9); *United States* v. *Frankel,* 65 F. 2d 285, 288 (C. C. A. 2), certiorari denied, 290 U. S. 682; *Russell* v. *United States,* 12 F. 2d 683, 686–692 (C. C. A. 6), certiorari denied, 273 U. S. 708.

CONCLUSION

The judgment of the court below affirming petitioner's conviction is correct. The case does not involve any conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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